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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1957

OTIS SHARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 3a–7a) is reported at 248 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals (Pet. 7a) was entered on October 2, 1957, and a petition for rehearing was denied on October 31, 1957 (Pet. 8a). The petition for a writ of certiorari was filed on November 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, in holding that petitioner's narcotics conviction was supported by

sufficient evidence, substituted its own findings of fact for those of the trier-of-fact.

STATEMENT

On July 3, 1953, a three-count indictment was filed against petitioner in the United States District Court for the Northern District of Illinois charging, in count 1, the unlawful purchase and possession of heroin in violation of 26 U. S. C. 2553 (a); in count 2, the unlawful sale and transfer of heroin in violation of 26 U. S. C. 2554 (a); and in count 3, fraudulent concealment of heroin in violation of 21 U. S. C. 174 (R. 2–4). On December 26, 1956, petitioner was found guilty by the court on all three counts. He was given a general sentence of 5 years imprisonment and fined $1.00 (R. 52–53). On appeal, the judgment was unanimously affirmed (Pet. 3a–7a).

At the trial, the Government introduced evidence that one Caldwell, while in the custody of federal narcotics agents, was searched for narcotics, found to have none, given $50.00 in marked money, and taken out by the officers to purchase heroin from his source of supply (R. 6–7, 16–17, 29–30). The officers accompanied Caldwell while he made a telephone call and then proceeded with him to petitioner's record store (R. 7, 17, 29). While the officers waited outside, Caldwell entered the store and remained therein for five to ten minutes. The officers could not see inside the store. Upon rejoining the officers, Caldwell was again searched. He did not have the money, nor did he have narcotics in his possession (R. 17). The agents proceeded along the street in their automobile,

let Caldwell out, sped half way around the block until they were in sight of Caldwell again, perceived petitioner walking toward Caldwell, saw their hands meet briefly, and arrested petitioner immediately. The $50.00 in marked money was found on petitioner, and a packet of heroin was found on Caldwell (R. 8–9, 18–19, 30–31).

One of the defense witnesses testified that petitioner was playing cards with him and two other men continuously for about an hour before the arrest, that petitioner got a telephone call and left, and that about five minutes later the witness looked out the window and saw petitioner being put in a squad car (R. 45). Petitioner also testified that he had been playing cards there all of the time for 45 minutes or an hour before his arrest, and that the telephone call was from the clerk at his store who reported Caldwell wanted to give him some money. According to petitioner, this money represented payment on a prior debt. He said that he met Caldwell on the street and Caldwell gave him the money there (R. 47–48).

At the conclusion of the trial, the court delivered an oral opinion. The entire opinion is as follows (R. 50–51):

> The Court has heard the testimony. The uncontradicted evidence is that one Caldwell was arrested, and he was searched. He was given some marked money, five $10 bills of marked money.
>
> He was escorted by the police to a certain location where he was released. He went to a record shop. He was under surveillance there.

He stayed a while, came out, and then the police escorted him to another point on the street, released him, two of them remained in the car, and he was under surveillance.

The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out.

Now, as to the contents of the telephone call, he states he received the call from a girl who worked in his office, and that Caldwell was there, that he would not give her the money but that he would give it to him, and a meeting was arranged.

He went out and met Caldwell on the street and got the money. (T. 357.)

Then comes contradiction or uncertainty in the evidence. However, the court is conclusively of the opinion that after the evidence which the officers introduced here, showing that they searched Caldwell immediately before releasing him and that he had no narcotics on him immediately prior to being released from custody, and that he had narcotics on him when he was apprehended immediately after he joined hands with Sears, and that Sears had the marked money, which is not contradicted, on him, which he said that Caldwell paid him for a debt—that does not impress the court.

The court is of the opinion that the marked money was delivered to Caldwell and the narcotics in question was delivered by the defendant Sears to Caldwell at the same time, and

that there was a consummation of a transaction there, and that the defendant is guilty.

On appeal, petitioner attacked the sufficiency of the evidence to support the finding of guilt. The Court of Appeals summarized the trial court's finding as follows (Pet. 4a):

> * * * one Caldwell, being in the custody of the United States narcotic agents, having been searched, was given $50.00 in marked currency bills; later, the officers, after Caldwell had made a telephone call, proceeded with him to defendant's shop. While the officers waited outside, Caldwell entered the building, returning to and rejoining the officers shortly later. He was again searched; the bills were no longer in his possession, and no narcotics were found on his person. The officers then proceeded to another point near at hand where they observed defendant Sears meet Caldwell, who had proceeded alone, and pass to him, from hand to hand, an object. They immediately arrested Sears, and found in his possession the bills they had given Caldwell, and, on Caldwell, narcotics contained in a brown envelope. Upon these findings, the court found Sears guilty.

These findings, according to the Court of Appeals, "were amply proved by the Government's evidence." Accordingly, the Court of Appeals upheld the conviction.

DISCUSSION

All the evidence adduced by the Government as to the alleged passing of the narcotics (see the Statement, *supra*, pp. 2–3) was circumstantial in nature.

Petitioner denied ever having anything to do with the narcotics found on Caldwell; Caldwell did not testify as to the transaction; and the Government agents standing nearby saw only that the two men clasped hands as they approached each other on the street. In short, there was no eyewitness testimony that petitioner passed the narcotics to Caldwell. But there was eyewitness testimony by Agent Hazer that Caldwell was searched shortly before meeting petitioner on the street and did not then have the narcotics on him (R. 17). The inference, of course, is that Caldwell could have obtained the narcotics only from petitioner on the street.

Despite its circumstantial nature, the Government's evidence is, we believe, more than sufficient, as the Court of Appeals held, to sustain the Government's theory of the case. According to this theory, the transaction was in two steps: first, Caldwell left the marked money at petitioner's store (either with petitioner or someone else); second, petitioner (then in possession of the marked money left at the store) met Caldwell on the street and handed over the narcotics to him. It was on the basis of this version of the facts that the Court of Appeals rejected petitioner's attack on the sufficiency of the evidence.

The difficulty here is that the trial judge's extemporaneous opinion is literally inconsistent with this two-step version of the transaction. According to the opinion, petitioner "went out and met Caldwell on the street and got the money" and the two men exchanged the money and the narcotics "at the same time." Given their literal meaning, these remarks

indicate that the trial judge concluded that Caldwell did *not* leave the money at the store but rather had it on him after leaving the store.

If this is the true meaning of the judge's remarks, it follows that the Court of Appeals has never tested the sufficiency of the evidence to support such findings. Normally, where the judge sits as trier-of-fact in a criminal case, findings are not required. See Rule 23 (c), Federal Rules of Criminal Procedure; cf. *Sullivan* v. *United States,* 348 U. S. 170. However, where findings are actually made, whether requested or not, a reviewing court is not free to sustain a conviction on the basis of a substituted set of findings permitted by the evidence. In this respect, the instant case is quite different from cases in which the trier-of-fact makes no findings.

Moreover, if it is true that the trial judge actually rejected the Government's two-step version of the transaction, a serious question arises as to whether his findings are not internally inconsistent. Agent Hazer testified (R. 17) that he "found no money, no narcotics, no nothing on Caldwell" when he searched Caldwell just before releasing Caldwell to meet petitioner on the street. The trial judge's opinion accepts this testimony as to the narcotics, but apparently rejects the same testimony as to the money; for, according to the literal language of the opinion, Caldwell must necessarily have retained the money on his person after the search so that he could exchange the money for the narcotics at the street-meeting with Sears.

In these circumstances, it is the Government's view that the case should be remanded to the District Court for further proceedings. The trial judge, we think, should be instructed to clarify his findings or, in the alternative, to grant a new trial if he believes that such a disposition would be more appropriate. In the event that the trial judge enters new findings, the way would, of course, be clear for petitioner to obtain fresh review of those findings in the Court of Appeals.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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